United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-7472

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

TOMAS ROSARIO, OVIDIO VEGA and RAY CABEL, Plaintiffs-Appellees, - against - AMALGAMATED LADIES' GARMENT CUTTERS' UNION, LOCAL 10 of I.L.G.W.U. and INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO, Defendants-Appellants.	C/A Ref. No. 76/7472 South. Dis. 76 Civ. 3204 (CBM)

B
P/S

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLANTS

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

* - *

TOMAS ROSARIO, OVIDIO VEGA and RAY CABEL,	:	C/A Ref. No. 76/7472
Plaintiffs-Appellees,	:	South. Dis. 76 Civ. 3204 (CBM)
-against-	:	
AMALGAMATED LADIES' GARMENT CUTTERS' UNION, LOCAL 10 of I.L.G.W.U. and INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO,	:	
Defendants-Appellants.	:	

* - *

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COURT FOR THE SOUTHERN DISTRICT
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STATEMENT OF THE ISSUES

POINT I

WHETHER THE COURT BELOW, ON A MOTION FOR PRELIMINARY INJUNCTION, WAS REQUIRED EITHER TO READ THE AFFIDAVITS IN SUPPORT OF AND AGAINST THE MOTION OR TO HOLD AN EVIDENTIARY HEARING, WHICH IT STATED IT WAS CONDUCTING.

A. Whether the Court erred in failing to read the supporting and opposing affidavits or to hold an evidentiary hearing.

B. Whether the Court erred in failing to make required findings.

C. Whether the Court erred in failing to require exhaustion of intra-union remedies especially since plaintiffs rejected defendant ILGWU's offer, as amended by the Court below, which met every objection of plaintiffs to a hearing of their appeal forthwith.

POINT II

WHETHER, ASSUMING IT WAS NOT REQUIRED TO EITHER HOLD AN EVIDENTIARY HEARING OR READ THE AFFIDAVITS, THE COURT BELOW ERRED IN GRANTING A PRELIMINARY INJUNCTION BASED UPON FINDINGS OF FACTS AND CONCLUSIONS OF LAW UNSUPPORTED BY THE STIPULATED FACTS AND STENOGRAPHIC TRANSCRIPTS OF THE PROCEEDINGS.

STATEMENT OF THE CASE

This is an appeal from an Order made by the Court below (Judge Constance Baker Motley) on September 20, 1976 and entered in the Office of the Clerk of the United States District Court, Southern District of New York on the same date. The Order granted the plaintiffs a preliminary injunction against defendants. It enjoined them from giving any force or effect to the disciplinary punishment imposed upon plaintiffs by the Trial Committee of defendant Amalgamated Ladies' Garment Cutters' Union, Local 10, ILGWU (hereafter Local 10) on or about January 29, 1976, pending trial and ultimate disposition of the action. The punishment was to suspend plaintiffs from attending membership meetings of Local 10 for limited periods. The preliminary injunction granted the identical relief prayed for in plaintiffs' Complaint (Joint Appendix, Exh. 2). 1/

THE FACTS

The Parties

Plaintiffs are members of Local 10 which is composed of cutters, markers and graders in various segments of the organized ladies' garment industry.

Defendant Local 10 is a subordinate labor organization of defendant International Ladies' Garment Workers' Union, AFL-CIO (hereafter ILGWU).

1/ Joint Appendix will hereafter be referred to as "Appx."

Defendant ILGWU is a labor organization with which autonomous subordinate labor organizations, such as Local 10, are affiliated. The ILGWU is governed by a Constitution (Appx., Exh. A of Exh. 19) adopted at a convention of delegates of each of its subordinate organizations who were elected as such by secret ballot. The Constitution of the ILGWU is also the Constitution of Local 10 and is binding upon all of its members. Article XXXV, Section 1 thereof (pp. 73-74) provides that if there is any doubt as to any meaning of any provision of the Constitution, the President of ILGWU, between sessions of the General Executive Board (hereafter GEB), and the GEB, between sessions of conventions, shall interpret the Constitution.

Charges Preferred Against Plaintiffs

On February 10, 1975, Abe Dolgen (hereafter Dolgen), acting in his individual capacity as a member of Local 10, preferred charges against plaintiffs (hereafter the accused) for violating enumerated provisions of the aforementioned Constitution. The specific charges were twofold: (1) against each of the accused for staging a sit-down in the office which Dolgen occupied as Manager of Local 10, thereby interfering with Local 10's duties of servicing its members and fulfilling its collective bargaining obligations to its members and vis-a-vis their employers; and (2) against plaintiff Cabel alone for seeking to provoke, in the waiting room of Local 10, physical action against officers of Local 10 by members thereof who were present therein.

Pending Prior Action in Regard to the Above Charges

Prior to the commencement of this action there had been two intra-

Union trials of the accused before the Executive Board of Local 10, sitting as a Grievance Committee, and two appeals from its decisions to the GEB Appeal Committee.

The Complaint in the instant action alleges in Paragraph 4 thereof "Another action, brought by the three plaintiffs against Local 10, its former Manager, and the City of New York, concerning matters related to the facts set forth herein is presently pending before this Court, captioned: Tomas Rosario, et al. v. Abe Dolgen, individually and as Manager, etc., et al., Docket No. 75 Civ. 4632 (CBM)." The precise caption of the other action is Tomas Rosario, Ovidio Vega and Ray Cabel, Plaintiffs, against Abe Dolgen, individually and as Manager of Amalgamated Ladies' Garment Cutters' Union, Local 10 of I.L.G.W.U. and the City of New York, Defendants.

The International Ladies' Garment Workers' Union was not named as and is not a defendant in that action.

Paragraph 4 of the Complaint in the instant action further alleges: "The facts complained of herein, however, occurred subsequent to the filing of the Complaint in that action." (Appx., Exh. 4)

There is not a word in the Complaint in the instant action with respect to the two prior hearings by the Executive Board of Local 10, sitting as a Grievance Committee, or to the two appeals from its decision to the GEB Appeal Committee or to the decisions rendered by either of these two bodies or to anything which had occurred before or had been decided by either of them. The two decisions of the Executive Board of Local 10 sitting as a Grievance

Committee and the two decisions of the GEB Appeal Committee of April 1975 and July 22, 1975 were alleged in the complaint in the other pending action and were principal points raised by the plaintiffs' affidavits in that action (Appx., Exh. 15(a), p. 9).

In December 1975, the attorneys for each of the defendants made motions to dismiss the complaint in the pending prior action. In mid April, the Court below called the attorneys for the parties to a pre-trial conference. It was pointed out to the Court that a motion was pending to dismiss the complaint. The Court below was not even aware of that fact. Accordingly, it set the motions for argument for May 21, 1976. The Court was asked whether it may be assumed that by that date it will have read the papers in the case. The Court stated that it would be and that was why it was setting the argument for May 21st. The motions were argued on that day, and no decision thereon has as yet been rendered.

GEB Orders a Hearing De Novo on the Charges Preferred Against Plaintiffs

On October 8, 1975, the GEB of ILGWU, on its own motion (Constitution, Art. XXIII, §5(j)), ordered that:

> " . . . because of the special circumstances surrounding the case, and the fact that the charges have already been heard twice by the Executive Board of Local 10, the charges shall be reheard de novo by a Trial Committee of Local 10, under the following conditions:
>
> "1) The Trial Committee shall be composed of rank-and-file members of Local 10 and shall consist of five (5) members and two (2) alternates selected by the membership of Local 10 at the next general membership meeting of the Local. Persons serving on Trial Committee shall not have previously been involved in hearing the charges or in

making the charges or in defending against them.

"2) The Trial Committee shall select one of its members as Chairman. It shall also select a Secretary from among its members who shall prepare the official minutes of the hearing which shall be filed in the offices of Local 10. The official minutes or true copies thereof shall be made available for inspection in the offices of Local 10 by either the charging party or the accused upon their written request therefor. True copies of the minutes shall be furnished if so requested in writing.

"3) Should the Trial Committee find the accused or any of them guilty, any penalty which might be imposed shall not include disqualification as a candidate for Union office." (Appx., Exh. B of Exh. 5)

Membership Meeting of Local 10
Held on November 24, 1975

On November 24, 1975, a membership meeting of Local 10 was duly convened, which plaintiffs Rosario and Cabel attended, and at which the above decision of the GEB of ILGWU of October 8, 1975 was read in full and a Trial Committee of five (5) and two (2) alternates were elected to hear the charges which Dolgen had preferred against plaintiffs. Only seven (7) members were nominated (Appx., Exh. 15(a), p. 13).

Hearing of Charges on December 18, 1975

After the Trial Committee had elected a Chairman and a Secretary to prepare the official minutes of the hearing, the Secretary gave due notice, in writing, on December 4, 1975, that a hearing by the Trial Committee of the charges would be held on December 18, 1975. The notice designated the time and place of the hearing, annexed a copy of the charges thereto, and gave the accused a reasonable time to prepare their defense (Appx., Exh. A. of Exh. 15(c)).

Hearing on December 18, 1975

On December 18, 1975, plaintiffs appeared at the hearing and were represented by two (2) lay counsel.[2/] Dolgen and his witnesses were outside the hearing room waiting to be called to testify, but Dolgen's lay counsel were present at the hearing. The Chairman of the Committee commenced by reading the decision of the GEB dated October 5, 1975, ordering a rehearing de novo. When he concluded, Dolgen's lay counsel observed that the accused had in their possession a tape recorder which they had put in operation for the purposes of recording the hearing. Dolgen's lay counsel objected to its use. The Trial Committee conferred, and the Chairman announced its ruling that the hearing may not be tape recorded.[3/] The Court below found that the accused "would have been allowed to make their own notes of the proceedings." (Appx., Exh. 3, p. 3)

When the accused and their lay counsel refused to abide by the ruling of the Trial Committee, the latter conferred again and the Chairman announced its decision that it "refused to continue the hearing with the recording device in the hearing room and adjourned the hearing for 3 weeks from December 18, 1975 for the purpose of giving the accused an opportunity to decide whether they will appear without a tape recorder and that if they persisted in bringing a tape recorder to the hearing on the adjourned date, the hearing will be held without them." (Appx., Exh. D of Exh. 15(c))

2/ This is provided in Article XXII, Section 3, of the Constitution of ILGWU. (p. 53)

3/ As will be discussed later, plaintiffs were fully aware that tape recording of disciplinary proceedings and appeals therefrom was not permitted.

Adjourned Hearing on January 8, 1976

Notice of the adjourned hearing was given to the accused and Dolgen by the Secretary of the Trial Committee by letter dated December 26, 1975, which contained the following paragraph:

> "The decision reached by the Trial Committee on December 18, 1975 was that you may not bring or use a tape recorder or any other electronic recording device at the hearing on January 8, 1976 or if the trial is continued, on any subsequent date. You are required to obey that ruling." (Appx., Exh. B of Exh. 15(c))

On January 8, 1976, the accused and their lay counsel appeared again with a tape recorder. The minutes of that meeting record the following:

> "It was noted by the Chairman that the accused brought into the hearing room a recording device. They had been told at the hearing of December 18, 1975, that if they insisted on having a recording device in the room, the hearing would be held without them. They again refused to remove the recording device and the trial committee adjourned to another room in the Local 10 office without the accused." (Appx., Exh. E of Exh. 15(c)

There the hearing was held. The failure of the accused to abide by the ruling of the Trial Committee was deemed equivalent to their intentional absence from the hearing after having been given due notice to attend (Appx., Exh. 21).

Decision of the Trial Committee
Rendered on January 29, 1976

After hearing Dolgen and his witnesses who gave their testimony in the form of written statements and having deliberated upon them as well as upon the written joint statement submitted by the accused in their defense, the Trial Committee sustained the first charge and suspended plaintiffs Rosario and Vega for 18 months and plaintiff Cabel for 12 months from attending or participating in membership meetings of Local 10. It did not sustain the second charge

preferred by Dolgen against Cabel and therefore dismissed it. The minutes of the hearing and the decision of the Trial Committee were sent to Rosario who requested the same (Appx., Exh. 6 of Exh. 15(b)). They were available to the other plaintiffs upon written request (Appx., Exh. B of Exh. 5).

Plaintiffs Failed to Exhaust Intra-Union Remedies

Under the ILGWU Constitution (Art. 23, §4, pp. 55-56),as indeed under the Labor-Management Reporting and Disclosure Act (hereafter LMRDA), the accused were required, if they felt aggrieved by the decision rendered against them by the Trial Committee, to appeal to the GEB Appeal Committee. They did so by letter dated February 7, 1976 (Appx., Exh. 16(c)). However, they themselves aborted the hearing of their appeal by refusing to comply with the GEB Appeal Committee's ruling that they may not tape record the appeal hearing. This will be fully elaborated on in Point I C, infra.

Plaintiffs Thwarted and by Their Own Admission Refused to Be Tried on the Charges Preferred Against Them

The charges preferred against the accused by Dolgen are serious. If sustained, the Trial Committee had power to impose what it deemed to be a proper disciplinary punishment. As will be demonstrated in Point I C, infra, plaintiffs' counsel admitted that, under no circumstances, were the accused willing to be tried on the charges. They not only aborted the appeal procedure, but even refused to proceed with the appeal upon the offer made by the ILGWU, as amended by the Court, which met every one of their objections.

Motions in the Court Below and Decisions Rendered

The Court below had before it plaintiffs' motion for a preliminary injunction, plaintiffs' motion for consolidation, and the motions of each of the defendants for summary judgment. At the very outset of the proceedings, the Court stated: "We will hear the plaintiffs' motion and then we will hear the defendants' motion." (Appx., Exh. 7, p. 2) It never heard or decided the motion for consolidation nor heard nor decided the defendants' motions for summary judgment. Indeed, all of the documents contained in these motions have now been transmitted to this Court as part of the record on appeal.

In connection with plaintiffs' motion for a preliminary injunction, the Court below rendered an oral opinion at the close of the proceedings on September 17, 1976 (Appx., Exh. 9, pp. 27-31). On September 20, 1976, it issued a memorandum opinion supplementing its oral opinion of September 17th (Appx., Exh. 3).

ARGUMENT

POINT I

ON A MOTION FOR A PRELIMINARY INJUNCTION THE COURT BELOW WAS REQUIRED EITHER TO READ THE AFFIDAVITS IN SUPPORT OF AND AGAINST THE MOTION OR TO HOLD AN EVIDENTIARY HEARING WHICH IT EXPRESSLY STATED IT WAS CONDUCTING. IT DID NEITHER. SINCE THE UNDISPUTED FACTS ARE INSUFFICIENT TO WARRANT THE GRANT OF A PRELIMINARY INJUNCTION, THE FAILURE TO HOLD AN EVIDENTIARY HEARING IN ORDER TO MAKE REQUIRED FACTUAL FINDINGS, INCLUDING EXHAUSTION OF REMEDIES, WAS ARBITRARY AND CAPRICIOUS AND, WITHOUT MORE, CONSTITUTES REVERSIBLE ERROR.

A. Failure to Hold an Evidentiary Hearing

Where the record below indicates that the Court acted arbitrarily and

capriciously in granting an injunction, the reviewing Court has the duty to reverse the decision as an abuse of judicial discretion. See, e.g., Dopp v. Franklin National Bank, 461 F.2d 873, 878-879 (2nd Cir. 1972).

Although the Court below purported to base its grant of injunctive relief on "hearings and argument," the transcript of proceedings in the Court below clearly shows that no evidentiary hearing was ever held (Appx., Exhs. 7, 8, 9).

The Court below sandwiched the argument on plaintiffs' motion for a preliminary injunction in between other business before the Court, for approximately an hour more or less on three different days.

The first phase of the argument was held on September 8, 1976, between 2:15 p.m. and 3:30 p.m. Plaintiffs' counsel set forth a distorted and convoluted version of the facts unsupported by anything in plaintiffs' affidavits. Hardly had counsel for Local 10 pointed out the distortions and long before he had finished his argument, the Court below cut him off and permitted plaintiffs' counsel to reply to him. He did not reply but presented entirely new facts which counsel for Local 10 was not given the opportunity to controvert at that time (Appx., Exh. 7, pp. 28-38).

The Court below then heard from counsel for the ILGWU on the question of exhaustion of remedies. It ordered him to produce a member of the GEB Appeal Committee at the next hearing to testify as to whether the GEB Appeal Committee permits the use of a public stenographer at its appeal

hearings.[4/]

The next phase of the argument was held on September 14, 1976, between 5:15 p.m. and 6:15 p.m. Counsel for ILGWU produced a member of the GEB Appeal Committee who was of no help because he testified that the question had never come up for decision by the GEB Appeal Committee. It was at that point that counsel for the plaintiffs made him his own witness and tried to prove that the GEB Appeal Committee was prejudiced and biased -- a matter never before raised by plaintiffs in any of their pleadings, affidavits or arguments in the instant action. The Court below ruled (Appx., Exh. 8, p. 44), that plaintiffs' counsel "attempted to establish through this witness that the Committee was biased and has failed to do so . . . "

The Court below made it abundantly clear that it was holding an evidentiary hearing. Addressing counsel for plaintiffs, the Court stated:

> "THE COURT: We can only take one thing at a time, Mr. Hall. He was telling me about an affidavit. I am telling him that this is a hearing for a preliminary injunction. We cannot cross-examine an affidavit." (Appx., Exh. 8, p. 3)

4/ The argument before the Court below started with a statement by plaintiffs' counsel referring to an alleged paragraph in the main affidavit of Klein, the Executive Secretary-Local 10, as to the reasons why a court reporter would not be allowed to record disciplinary proceedings (Appx., Exh. 7, pp. 35, 37). In fact, Mr. Klein's affidavit said nothing about a court reporter (Appx., Exh. 15(a), p. 21). Klein's affidavit was made on behalf of Local 10; he had no authority to speak for or bind ILGWU. Somehow, at the end of the argument on that day, instead of talking about a court reporter, for some inexplicable reason, the argument focused on the use of a public stenographer. It was then that the Court ordered counsel for ILGWU to produce someone from the GEB Appeal Committee to testify as to whether or not the accused would be denied their own public stenographer to record the

(continued)

At the close of the second phase of the argument on September 14, 1976, the following colloquy occurred between the Court and counsel for the parties (Appx., Exh. 8, pp. 47-49):

> "MR. ZIMNY: [Counsel for defendant ILGWU] Are we going to have an evidentiary hearing?
>
> "THE COURT: We are having an evidentiary hearing now which will continue on Friday. I want to impress upon you -- I said it the last time -- when you have a motion for a preliminary injunction on before a court and one party says the flag is green and the other says it is black, we have to have witnesses. That's what we are doing here. I don't know why it is so novel for you that we are calling witnesses so that I can develop a record here and make findings of fact instead of listening to lawyers trade charges and change their statements from one minute to another. That's what we are doing. We are trying to make a record here based on the testimony of sworn witnesses.
>
> "Is that clear?
>
> "If you have any witnesses bring them Friday. That applies to both sides in this case, and I don't want to hear any more argument, charges, and counter-charges. We want testimony, evidence, so that I can make findings of fact either granting or denying this preliminary injunction.
>
> "Is that clear?
>
> "MR. HALL: Yes, your Honor.
>
> "MR. SCHLESINGER: [counsel for defendant Local 10] One question, your Honor: Does that apply also to the trial committee or are you only on the appeal committee? I am referring to the trial committee that rendered the decision, Local 10.

4/ (continued)
appeal (Appx., Exh. 7, pp. 53, 54).

There is a difference between a court reporter and a public stenographer; a court reporter is one that is certified by the Clerk of the Court of the Southern District. In contrast, a public stenographer is not necessarily a (continued)

"THE COURT: Does what apply?

"MR. SCHLESINGER: What you have just been saying.

"THE COURT: They are a defendant here. You represent them. It applies to them, yes."

The final phase of the argument was held on September 17, 1976, between 5:15 p.m. and 6:15 p.m. Plaintiffs' counsel produced the three plaintiffs to testify. Counsel for defendant ILGWU produced one witness (Mr. James Lipsig) to testify concerning the facts stated in his main answering and reply affidavits submitted to the Court below in opposition to plaintiffs' motion for a preliminary injunction. Counsel for defendant Local 10 produced seven witnesses to testify. The Court below did not permit any witnesses to testify. The following colloquy occurred between the Court below and counsel for defendant Local 10 on September 17, 1976 (Appx., Exh. 9, pp. 16-17):

"MR. SCHLESINGER: Let's have an evidentiary hearing.

"THE COURT: Well, I am trying to find out what we were are going to hear.

"MR. SCHLESINGER: You are going to hear from us that he had a fair trial. You are going to hear from us that I wrote to Mr. Hall and told him the reasons why he wasn't entitled to previous minutes.

"You are going to hear from me that these people were asked to take out a tape recorder, which they brought with them. They had been advised before that they couldn't use a tape recorder. You are going to hear from me that they're cheaters and liars. That when they said they weren't having a tape recorder,

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4/ (continued) competent stenographer; any person with a minimal amount of experience in taking shorthand, reading back the notes, and transcribing the same can claim to be a public stenographer.

they did record. You are going to hear from me that Mr. Spitzer will give you a tape recording which is absolutely doctored, and tailored in the garment industry language to fit his needs. We are going to show that the minutes of meetings are honest and fair, that these cutters whom I brought from the shops are decent, honest men who have done their job. They are not controlled. They are not manipulated. They were not handpicked. The doors were not locked. Nobody opened doors with any keys. We are going to prove that these are honest people and that these people, Mr. Tomas Rosario, and Mr. Spitzer want to destroy this union and we aren't going to let them do it. That's what we are going to prove."

Included among the witnesses which counsel for defendant Local 10 produced to testify, were David Mittleman and Harold Brodsky, Chairman and Secretary, respectively of the Trial Committee. They would have testified, in addition, to the reasons which prompted the Trial Committee to deny the accused the right to tape record their disciplinary hearing as follows: (a) the accuser did not bring a tape recorder to the hearing to record it; (b) a tape recorder could be manipulated in various ways such as stopping the recording when damaging testimony is offered against the accused; (c) erasures on tapes can be made easily; (d) tapes can be replayed on another tape recorder and, in the process of doing so, portions originally taped which are unfavorable to the accused could be eliminated; (e) the contentions could then be made by the accused that tapes which had been tampered with were more reliable than the official minutes taken by the secretary; (f) the Watergate experience when 18-1/2 minutes of tape had been erased and, on a playback, it was unclear what had been said; and (g) the confusion which results when more than one person speaks at the same time. They would also have testified to the truth of the allegations in their affidavits submitted in opposition to plaintiffs' motion for a

preliminary injunction.

They would also have testified that plaintiffs never requested to bring a stenographer to record the hearing as well as to all of the other facts contained in their answering and reply affidavits.

Among his seven witnesses, counsel for defendant Local 10 also produced Klein who would have testified as to the facts contained in his answering and reply affidavits and, more particularly, would have confirmed the authenticity of defendants' Exhibits A and B offered for identification (Appx., Exhs. 12, 13); that plaintiffs never requested a stenographer. Further, he would have testified with respect to his allegation in his main answering affidavit (Appx., Exh. 15(a), pp. 21-22) that:

> "It has been the tradition of the ILGWU and its Locals and its other subordinate organizations not to permit the use of stenographers at Grievance Committee hearings, Grievance Committee trials or at GEB Appeals Committee hearings. A stenographer selected by the accuser or by the accused may be willing to doctor his or her notes at the request of the party who pays him or her. Often the stenographer, depending on the extent of his or her capability, is unable to hear accurately or read back what a speaker has said or to record what has been said when more than one person speaks at the same time. Moreover, the fees of public stenographers are staggering and Local 10 has never been willing to bear the expense."

B. Failure to Make Required Findings of Fact

The Court below purported to base its order on certain findings of fact and conclusions of law arrived at after an evidentiary hearing. Yet, the transcript speaks for itself -- no such hearing was ever conducted, no record was ever made.

Specifically, the Court failed to make the following findings of fact which were necessary to justify injunctive relief:

(a) It did not find that the membership meeting of Local 10 on November 24, 1975 was improperly convened or that the Trial Committee was improperly elected by the membership of Local 10, or that the Trial Committee was biased or prejudiced or otherwise misconducted itself, or that the minutes of the Trial Committee were inaccurate, or that the GEB Appeal Committee of the ILGWU was or is biased or prejudiced or otherwise misconducted itself or that any of the minutes of the GEB Appeal Committee were inaccurate.

(b) It did not find that plaintiffs requested a stenographer to take the minutes of any of the three disciplinary hearings involving the charges preferred against them.

(c) It did not find in favor of plaintiffs' attorney's contention that plaintiffs were improperly "denied access to the minutes of the two prior disciplinary proceedings (previously reversed on procedural grounds by union appellate tribunals) which they considered necessary for proper preparation of their defense."

(d) It did not find in favor of plaintiffs' attorney's contention "that the punishment was imposed upon them in retaliation of the exercise of their rights guaranteed to them by 29 U.S.C. §411(a)(1) and (2), specifically for their exercise of the right to criticize the incumbent union officials."

(e) It did not find in favor of plaintiffs' attorney's contention "that the punishment imposed, by its own terms, is violative of the LMRDA in that

it prevents the plaintiffs from exercising certain rights attendant upon union membership, yet falls short of suspending them from union membership."

C. The Court Below Failed to Find that Plaintiffs Exhausted Their Intra-Union Appeal Remedies. This was Error by the Court Below and was Especially Glaring Because Defendant ILGWU, with the Court's Amendment, Met Every Objection Raised by Plaintiffs to the Hearing of the Appeal and Plaintiffs Still Refused to Proceed Therewith. Despite that Fact,the Court Below Erred in Failing to Order Plaintiffs to Complete Their Appeal to the GEB Appeal Committee. By Their Own Admissions, Plaintiffs Did Not Want to Be Tried on the Serious Charges Preferred Against Them and Thwarted Every Effort to So Try Them.

The cases are legion, and are discussed below, that plaintiffs are required to exhaust their intra-union appeal remedies before they are entitled to seek judicial relief. The plaintiffs herein did file an appeal from the Trial Committee's decision of January 29, 1976 to the GEB Appeal Committee. A hearing on the appeal was scheduled. The plaintiffs and their lay counsel appeared. So did Dolgen, his witnesses, and his lay counsel. However, the hearing was aborted because plaintiffs demanded the right to tape record the appeal hearing,although they had been repeatedly informed in prior disciplinary proceedings in which they were involved that the Appeal Committee would not hold a hearing if plaintiffs attempted to tape record it.

If James Lipsig (Assistant Executive Secretary of ILGWU) had been permitted to testify at the "hearing" in the Court below, he would have confirmed that his letter, which gave notice to the plaintiffs of the hearing of the appeal, specifically requested that plaintiffs or their representative "be present . . . to support [their] appeal" and, if they "cannot, or will not,be

present," to advise him immediately. Plaintiffs did decide to be present and did appear at the appeal hearing but the hearing was adjourned because of their refusal to stop tape recording it. The Appeal Committee ruled that the hearing would continue as soon as plaintiffs indicated they would be present without tape recorders. Having chosen to be present, the Appeal Committee still awaits their attendance at a hearing without a tape recorder. Plaintiffs never stated by letter or otherwise that they did not wish to be present on the adjourned date of the appeal hearing or that they were willing to rest their appeal on their letter which stated the grounds thereof.

It is true that Art. 22, §4 of the Union Constitution states that, if an accused fails to appear, the hearing shall proceed forthwith. However, the GEB Appeal Committee reasonably interpreted this provision as meaning that, if an accused chooses to invoke the procedures of the GEB Appeal Committee, the appeal will not proceed until the accused complies with its procedures. This is a different case than the Trial Committee which cannot permit the accused to thwart its hearing on the charges by refusing to obey the dictates of this Committee. Thus, it was reasonable for the Trial Committee,in contrast to the GEB Appeal Committee, to proceed in the absence of the accused, pursuant to Art.22, §4. 5/

5/ The argument advanced by counsel for plaintiffs in the Court below that the appeal hearing could have been held in plaintiffs' absence -- when plaintiffs specifically expressed their desire to be present -- destroys his argument that the Trial Committee, which heard the charges in the first instance, had no right to proceed in plaintiffs' absence.

As counsel for the ILGWU stated to the Court below, the appeal hearing was adjourned after repeated opportunities (or exchange of five letters) to the plaintiffs to continue the appeal without tape recorders.

> "MR. ZIMNY: We therefore have an incomplete hearing because they refused to abide by a rule of the Appeal Committee. The Appeal Committee told them they would go forward as soon as they indicated they would abide by that ruling. They have not done so although there have been continued opportunities in writing for them to do so.
>
> "They were also told they could make their own notes because in one letter they suddenly said apropos of nothing that had preceded, 'This means that I can't make my own notes either,' and the secretary assured them they were free to make their own notes."

During the proceedings in the Court below on September 14, counsel for ILGWU submitted to the Court an affidavit of the President of the ILGWU in which he interpreted the Constitution, as he had a right to do in between sessions of the GEB, that, in disciplinary proceedings or appeals therefrom, neither a tape recorder nor a stenographer may be used to record the hearings.

However, the affidavit continued with an offer which would have permitted the appeal to proceed forthwith. The offer in the affidavit was expanded by counsel for the ILGWU in the following colloquy between him, the Court below, and counsel for plaintiffs:

> "MR. ZIMNY: As a result of my review of the transcript, I discussed it with the president of the union who authorized me to say that if it would solve the matter and in line with your suggestion he would appoint an appeal committee consisting of vice presidents who were not involved in either of the first two hearings and that's where the claim of bias comes in, to hear the case under the conditions set forth in his affidavit to you beginning at page 5 which Mr. Gross testified about. 6/

6/ On page 5 of his affidavit, the President stated: "If your Honor should (continued)

"THE COURT: What are those conditions?

"MR. ZIMNY: Those conditions are that as in the Kiepura case this does not establish a precedent. The stenographer should be a court stenographer certified by the clerk of the court. Copies of the transcript should be delivered to the chairman of the GEB Appeal Committee, and to the charging party.

"If plaintiffs want an early decision they should order expedited transcripts. The expenses of court reporters have to be borne as in the Kiepura case by plaintiffs, and the appeal should be a hearing de novo by the GEB appeal committee to take place at the earliest possible date. The charging party and the accused shall have the right to be represented by lay counsel in the manner provided in the constitution.

"All parties have a right to present whatever witnesses they desire and to give testimony orally or in writing, as is customary in ILGWU disciplinary proceedings they have the right to confront and cross examine witnesses and to make opening and closing statements.

"Members of the GEB appeal committee have the right to question any witnesses. In the meantime the decision rendered by the trial committee remains in full force and effect as provided in the ILG constitution.

"MR. HALL: Your Honor, we have --

"MR. ZIMNY: In addition, the President goes on to say that the minutes of the trials, those held in February and May, 1975 and that includes the minutes of the GEB appeal committee hearing on April 28th and July 22, 1975, need not be given to anyone because they could be highly prejudicial.

6/ (continued)
conclude that there are special circumstances in the case before you which require use of a stenographer at the appeal hearing it may be in line with the Kiepura case, but without establishing a precedent for any other disciplinary trial or appeal in which the International Ladies' Garment Workers' Union and/or its subordinate organizations may be involved, to order that a stenographer attend the Appeal Committee hearing, but under the following conditions:"

"Moreover, they're not needed for a defense. Rosario, Vega and Cabel have minutes of the hearings held by the trial committee on December 18, '75 and January 8, '76 and the decision rendered by it on January 29, 1976. I might add they also have the minutes of the aborted GEB committee appeal hearing on April 8, 1976.

"THE COURT: They have all the prior minutes?

"MR. ZIMNY: All the prior minutes they have.

"THE COURT: Of all the hearings?

"MR. ZIMNY: Not of all the hearings of the current hearings, the hearings which have taken place since the GEB ordered a new trial before a new trial committee. The trial of appellate minutes are in their possession. Now he goes on to say that if these plaintiffs should now request the testimony of the charging party, Abe Dolgen and his witnesses at the two trials which were held in February and May, '75 for the purpose of confronting them with their previous testimony, a request which they have heretofore not made, the request should be granted. The appeal committee will make its decision as soon as reasonably possible after receipt of the transcripts of the hearing from the court reporter, and notices of the decision will be sent to the plaintiffs as well as to all other interested parties as soon as it is rendered.

"MR. HALL: Your Honor, we have exhausted our remedies now for about, for more than eight months since the trial in the local union in January. We feel we are entitled to come to court and I don't see Mr. Zimny's late invention of a new appeal that we have to exhaust as being appropriate. It does seem to me that the denials of right in this trial last January are many and substantial, and that we are entitled to have that punishment set aside.

"Now, if the union then wants to try them again, and if there's no obstruction to that, they can try them again but we think we are entitled to have this punishment set aside.

"THE COURT: If this instant punishment is set aside by the Court do you feel that the union has a right to try them again?

"MR. HALL: Well, I would challenge it because we have now been tried three times and punished three times. These three members have been suspended from many or most of their union rights as far as participation is concerned since February I believe

of 1975, twice on decisions which the union itself admits are invalid.

"In one of those decisions the charging party sat as the chairman of the trial committee.

"MR. SCHLESINGER: That is not true.

* * * * *

"THE COURT: Well, let me ask you this, Mr. Hall, if the union should give them a new hearing with an appeal committee consisting of persons who have not previously sat on this, and if they permit the plaintiffs to bring an official court reporter of some kind, and if the punishment is set aside pending the outcome of that hearing would that --

"MR. HALL: No, your Honor.-- pending the outcome of that hearing. I think really that we are entitled to have the punishment set aside period....."

This position taken by plaintiffs' counsel was so obstructive and antagonistic that the Court below should have,at this point, ordered the hearing of the appeal to proceed forthwith before the GEB Appeal Committee under the terms outlined by counsel for ILGWU, as amended by the Court. Its failure to do so constituted error because it clearly contravened established law requiring exhaustion of intra-union remedies. The error was especially glaring because defendant ILGWU, with the Court's amendment, met every objection raised by plaintiffs to the hearing of the appeal and plaintiffs still refused to proceed therewith.

In Smith v. General Truck Drivers, 181 F. Supp. 14 (S.D. Calif., 1960), the Court held that:

". . . because plaintiffs failed to exhaust the appeal hearing procedures provided by the Union and required by Section

> 101(a)(4) of the Labor-Management Reporting and Disclosure Act, their proceeding in the Court below was premature and should have been dismissed."

In Harris v. International Longshoremen's Assoc., Local 1291, 321 F.2d 801, 805 (10th Cir. 1963) the Court stated:

> "The basic intent and purpose of the provision [Section 101(a)(4)] was to insure the right of a union member to resort to the courts, administrative agencies, and legislatures without interference or frustration of that right by a labor organization. On the other hand, it was not, and is not, the purpose of the law to eliminate existing grievance procedures established by union constitutions for redress of alleged violation of their internal governing laws. Senator Kennedy, 2 NLRB, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, 1432."

The Court in Harris emphasized the requirements that plaintiffs first attempt to exhaust union machinery for the adjustments of intra-union grievances before resolving those grievances in a court of law. The Court's reasoning is applicable to the instant case where the plaintiffs failed to comply with the ILGWU's constitutional requirement of exhaustion of remedies (See, Article 23, Section 5, cf. Article 20, §1(t) of Constitution) by failing to remove their tape recorders in accordance with the ruling of the GEB Appeal Committee, thereby depriving it of the opportunity to render a decision in their case. Due to the plaintiffs' own conduct, the disposition of their appeal before the GEB Appeal Committee rests in limbo. The GEB Appeal Committee, in the instant case, should have been given an opportunity by the Court below to complete the hearing of the appeal as required by the ILGWU Constitution, Article 20, Section 1(t) and Article 23, Section 5, before it judicially intervened. By becoming mem-

bers of the union, plaintiffs contracted to be bound by its procedures, including its appeal procedures. Smith, supra, at p. 17; Rizzo v. Ammond, 182 F. Supp. 456, 471 (D. N.J., 1960).

The legislative history of the LMRDA, as well as the wording of Section 101(a)(4) thereof, supports the ILGWU's position. If union members were able to bring suit in court against a union or its officials without giving the union a reasonable opportunity to put its own house in order, the Congressional objective to maintain the integrity of union self-government would be abrogated. A court which precludes a union from the opportunity to hear the appeal of an aggrieved party in defiance of the statutory command that it do so is destructive of union self-government. The language of Section 101(a)(4) clearly requires exhaustion of remedies -- not the contemptuous abandonment thereof evidenced by plaintiffs' conduct.

Nor can plaintiffs claim the right to change their forum because four months have passed during the Union's proceedings. Whatever delay has occurred has been occasioned by the plaintiffs' own conduct in refusing to follow the fair rule of the GEB Appeal Committee not to tape record the appeal hearing. Even where more than four months have elapsed "[p]laintiffs] cannot take advantage of [their] own delay to satisfy the statute." Carroll v. Associated Musicians of Greater N.Y., Local 802, 235 F.Supp. 161, 171 (S.D.N.Y., 1963). Plaintiffs had known for well over a year that tape recorders were not permitted.

Exhaustion of Union remedies has been excused only under special circumstances.

> "When the plaintiffs will suffer irreparable harm in their jobs or in the exercise of rights guaranteed to them under the LMRDA courts have found the preservation of the individual interest more important than that of union autonomy. Similarly, when the internal appeals structure is inadequate or illusory, or is controlled by those to whom the plaintiff is opposed, exhaustion has been deemed futile and contrary to the purposes of the LMRDA. Finally, where the Union has consistently taken a position opposed to that of the plaintiff and makes no indication that it will alter its views, there is no purpose in requiring an adjudication by the labor organization. [Case citations omitted.]

The Court below made no findings with respect to the above grounds for excusing exhaustion of internal union remedies, and, in fact, there existed no such grounds.

In Farowitz v. Associated Musicians of Greater New York, Local 802, A.F. of M., 330 F.2d 999 (2nd Cir., 1964), the District Court did not require the plaintiff, a suspended union member, to exhaust his internal union remedies where it

> "found that a further appeal . . . to the International Executive Board would have been futile, inasmuch as the Federal [had] consistently taken a position contrary to [the plaintiffs'] and [had] . . . been asserting its position in litigation . . . ."

No such futility can be found with the ILGWU's appeal procedure in the instant case.

The GEB Appeal Committee reversed and remanded the first decision of the Grievance Committee of Local 10 and, after it had affirmed the second decision of the Grievance Commit[illegible]he GEB, on its own motion, later ordered a rehearing de novo on the charges against the accused. This irrefutably demonstrates that the accused's appeals were not futile. On this basis the Court below should not only have denied the preliminary injunction but should have

dismissed the case and required plaintiffs to complete their appeal to the GEB Appeal Committee from the decision rendered against them by the Trial Committee of Local 10.

By rejecting the offer made by defendant ILGWU, as amended by the Court below, and by plaintiffs' counsel's own admission in the Court below, it is unequivocably clear that plaintiffs never did want to be tried on the charges against them and that they would do as they have done, employ every stratagem in their power to thwart it.

Witness this colloquy between counsel for the plaintiffs and counsel for ILGWU:

> "MR. HALL: The question was raised last Thursday as to whether a hearing and, in fact, a trial, because Mr. Zimny insists there was going to be a trial de novo, could be had by the Appeal Committee, and what I am saying is there could be no fair trial by this Appeal Committee. This Appeal Committee has prejudged the plaintiffs guilty on the charges. . . .
>
> "MR. ZIMNY: That claim has never been made before. It is an obvious afterthought, and it is clear they want no trial.
>
> "MR. HALL: Certainly. I want no trial.
>
> "MR. ZIMNY: You want no trial under any circumstances. . . .
>
> "THE COURT: We can resolve it this way: Have you raised in these papers any claim that the present appeal board is biased?
>
> "MR. HALL: The question would have no relevance to the papers.
>
> "THE COURT: Answer the question.
>
> "MR. HALL: No, I have not.
>
> "THE COURT: We are not going into that. You didn't raise that."

Thus, there is absolutely no support in the record for the issuance of the preliminary injunction. The Court below totally disregarded its own dictates that such an injunction could not issue until there was an evidentiary hearing. Moreover, the record shows that the Court below did not even rely on the affidavits as support for the grant of injunctive relief. In fact, defendants respectfully submit that it never read these affidavits -- nor any of the memoranda of law submitted by defendants -- which is precisely why she perceived the need for testimony. Yet, without taking any evidence and without relying on any of the submitted papers, the Court below granted plaintiffs' motion for preliminary injunctive relief. To issue an injunction without any factual or legal support therefor is clearly an abuse of discretion, warranting reversal thereof by the reviewing court. See Dopp, supra.

POINT II

NEITHER THE CONCEDED FACTS NOR ANYTHING ELSE IN THE STENOGRAPHIC TRANSCRIPT SUPPORTS THE FINDINGS OF FACT AND CONCLUSIONS OF LAW MADE BY THE COURT BELOW. THE GRANT OF A PRELIMINARY INJUNCTION UNDER THESE CIRCUMSTANCES VIOLATES TRADITIONAL EQUITABLE CRITERIA AND THEREFORE CONSTITUTES REVERSIBLE ERROR.

The Conceded Facts

Assuming arguendo that the Court did not have to read the affidavits or hold an evidentiary hearing because of the existence of conceded facts, the issue is whether or not these facts justify the findings and conclusions of law

made by the Court below which are prerequisite to the grant of a preliminary injunction. It is clear that they do not.

The only conceded facts in this case are that:

(a) Plaintiffs insisted upon the right to bring a tape recorder to their disciplinary hearings, both on December 18, 1975 and January 8, 1976, and also at their appeal hearing on April 8, 1976.

(b) Both the Trial Committee of Local 10 and the GEB Appeal Committee refused to conduct the disciplinary proceedings in the presence of plaintiffs, so long as they insisted on bringing a tape recorder.

(c) Plaintiffs would not have been allowed to bring a public stenographer to the hearings at their own expense, even if they had requested permission to do so, although they would have been allowed to make their own notes of the proceedings.

(d) The result of plaintiffs' refusal to accede to the demand that they not bring a tape recorder was that on January 8, 1976, the Trial Committee withdrew to another room to consider the merits of the charges and that, on January 29, 1976, the Trial Committee found plaintiffs guilty of violations of the Union Constitution stemming from an incident at the office of the Local's manager on January 29, 1975.

(e) On April 8, 1976, the GEB Appeal Committee met to consider plaintiffs' appeals, but refused to do so until such time as plaintiffs agreed to come to the hearing without a tape recorder; because of plaintiffs' refusal to come to the appeal under such conditions, the appeal of this trial has never been

determined.

Applying traditional equitable criteria to these conceded facts, the grant of a preliminary injunction is unwarranted. In any event, the injunction is meaningless as applied to defendant ILGWU, for its role herein is a limited one; it sits solely in an appellate capacity and it neither imposes punishment nor continues the punishment (Appx., Exh. 7, p. 38).

The Law

Rule 65 of the FRCP governs the issuance of preliminary injunctions in federal courts. However, this rule is merely procedural; it does not change the substantive law governing the standards for issuance of preliminary injunctions. See Moore's Federal Practice, Commentary on Rule 65, at pp. 65-17. Thus, traditional equitable principles determine whether or not preliminary injunctive relief is warranted. See id. at 65-39; Note, Developments in the Law - Injunctions, 65 Harv. L. Rev. 994, 1056-1059 (1965).

In Schonfeld v. Penza, 360 F. Supp. 1228, 1235 (S.D.N.Y., 1972), affirmed, 477 F.2d 899, 904 (2nd Cir. 1973), the Court granted a preliminary injunction in a case under the LMRDA only after it had made a finding that plaintiffs had demonstrated a "probable likelihood of success on the merits."

A similar standard was employed in another case under the LMRDA where the Court denied plaintiffs' request for a preliminary injunction. In Santos v. Bonanno, 369 F.2d 369 (2nd Cir. 1966), the Court held that such relief was not warranted because the union constitution did not, on its face, grant the transfer rights sought by plaintiffs. Thus, there was not "a clear showing of probable

success and irreparable injury" sufficient to warrant an injunction under 29 U.S.C. §§411(a)(1), (2), 412. For other LMRDA cases which require a showing of "probability of success" and "irreparable injury," see, e.g., Broomer v. Schultz, 239 F. Supp. 699, 702 (E.D. Pa. 1965), affirmed, 356 F.2d 984 (3rd Cir. 1966); cf. Danielson v. Joint Board of Coat, Suit and Allied Garment Workers Union, I.L.G.W.U., 494 F.2d 1230, 1241 (2nd Cir. 1974), in which the Court stated that general equitable criteria are also applicable to 10(l) injunctions under the NLRA.

In addition to the above criteria, a plaintiff seeking injunctive relief must demonstrate that there is no adequate remedy at law. Judge Motley herself recognized this in her decision in the LMRDA case of Sheridan v. Liquor Salesmens U., Local 2, D.R.W. & A.W.I.U.A., 303 F.Supp. 999, 1006 (S.D.N.Y.,1969). Further, an interlocutory injunction will not issue when its effect is to grant plaintiff the full relief sought in the lawsuit, i.e., if the only relief sought by plaintiff is a permanent injunction, then the grant of preliminary injunctive relief is unwarranted. See, e.g., Wagner v. Long Island University, ____ F.Supp.____, 13 FEP 512, 514 (E.D. N.Y.,Sept. 1, 1976) citing Diversified Mortgage Investors v. U.S. Life Title Insurance Company of New York, ____ F.2d_____ , Civil No. 75-7428 (2nd Cir., June 30, 1976); Paramount Pictures Corp. v. Holden, 166 F. Supp. 684, 691 (S.D. Calif.,1958); Anderson-Friberg, Inc. v. Justin R. Clary & Son, 98 F. Supp. 75, 82 (S.D. N.Y.,1951).

Finally, under the test articulated in the Second Circuit (Sonesta International Hotels Corp. v. Wellington Associates, et al., 483 F.2d 247, 250

(2nd Cir. 1973):

> ". . . The settled rule is that a preliminary injunction should issue only upon a clear showing of either (1) probable success on the merits and possible irreparable injury, or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief." (citations and cases omitted) [emphasis added]

In labor cases, it is undisputed that any relaxation of these traditional equitable principles is totally unjustified. As stated in McLeod v. General Electric Co., 366 F.2d 847, 849 (2nd Cir. 1966), vacated as moot, 385 U.S. 533 (1967):

> "It is black-letter law that issuance of an injunction is an extraordinary remedy indeed. This is especially true in the labor field where Congress by the Norris-LaGuardia Act deprived the federal courts of jurisdiction to issue injunctions in labor disputes."

ographic Transcript

In the instant case, nothing contained in the stenographic transcript of the proceedings below supports the Court's findings and conclusions as to these traditional equitable criteria.

(a) There is no support in the stenographic transcripts of the proceeding below (Appx., Exhs. 7, 8, 9) for the finding of the Court that the accused will suffer irreparable damage or injury if a preliminary injunction is denied. Merely stating that is so is not proof that it is so.

During the proceedings in the Court below, counsel for Local 10 stated that the disciplinary punishment imposed upon plaintiffs was minimal (Appx., Exh. 7, pp. 26-27). Plaintiffs were entitled to attend meetings of the

Executive Board of Local 10 where the business of the Local is transacted and were entitled to be present at membership meetings of Local 10 to which they were invited to attend by letter. Letters were sent to them to attend the meetings of May 17, 1976 and May 25, 1976 (Appx., Exhs. 3, 4 of Exh. 15(e)).

Plaintiffs will receive letters to attend the membership meetings of Local 10 at which nominations and elections of officers for the ensuing term will be held. If Klein had been permitted to testify, he would have testified to that effect.

The only membership meeting from which plaintiffs were barred they broke into, but were denied participation therein. The only other membership meetings from which plaintiffs were to be barred from attending was the meeting of September 20, 1976, which the injunction issued by the Court below permitted them to attend, and the membership meeting to be held on November 15th, which they will be permitted to attend unless the preliminary injunction issued by the Court below is reversed. At this meeting there will be no nominations or elections held for officers and, therefore, no electioneering or campaigning for any prospective candidates for office in Local 10 will take place. By the time that the 1977 meetings take place, plaintiff Cabel's suspension will have expired. There will be only two more meetings left for the other two plaintiffs to attend. No urgent business will arise at those meetings. The collective agreements have already been signed in the garment industry; by that time nominations for and election of officers will already have been held and only routine business will be discussed, mainly listening to the Manager's report.

For the serious offense charged against the accused, the disciplinary punishment imposed against the plaintiffs by the Trial Committee on January 29th was minimal indeed.

Since no witnesses were called to testify, no testimony appears in the stenographic transcript, and no concession was made by defendants' counsel, that plaintiffs would suffer irreparable injury if the preliminary injunction were denied. The mere statement of the Court that it seemed to it that barring plaintiffs from attending the meeting on September 20th would result in serious harm to them is not evidentiary proof that such irreparable harm existed.

(b) There is no support in the stenographic transcripts of the proceeding below for the finding by the Court that plaintiffs have "established the probable success of the merits." (Appx., Exh. 9, p. 30). Merely stating that it is so is not proof that it is so.

There is absolutely no evidence whatsoever in the stenographic transcript of the proceeding below to establish the above finding of the Court.

In order to make such a finding or reach such a conclusion, the Court below was required to render a decision upholding the right of a member involved in disciplinary proceedings to make his own tape or stenographic recording of the trial. The Court below did not do so. No complex issue was involved which required the Court to delay its decision on this point until a trial of this case is had, if ever. The conceded facts establish either that the defendants were right or wrong. The Court had a clear duty to decide this issue and not postpone it by invoking the shibboleth of "probable success on the merits."

Merely to make a finding based upon no evidence whatsoever that plaintiffs have "established a probable success of the merits" is clearly erroneous. Moreover, there is no precedent for the holding that a member has a right to make his own tape or stenographic recording of the trial. Such a holding would constitute undue interference with the internal affairs of unions.

The LMRDA, Title I, §101(a)(5), 29 U.S.C. §411(a)(5) provides for procedural safeguards against improper disciplinary proceedings:

> "No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for non-payment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing."

In Parks v. Int'l Brotherhood of Electrical Workers, 314 F.2d 886, 904 (4th Cir. 1963), cert. denied, 372 U.S. 976 (1963), quoted with approval in Falcone v. Dantinne, 420 F.2d 1157, 1165 (3rd Cir. 1969), the court interpreted the term "fair hearing" as follows:

> "The common law clearly requires that, to be valid, expulsion of a member . . . must be rendered after a 'fair hearing . . . .' The elements of such a 'fair hearing' often resemble constitutional due process requirements and generally encompass full notice and a reasonable opportunity to be heard . . . ." (emphasis added)

State and federal law, both before and after the passage of the LMRDA, and the legislative history of the Act itself reflect a strong reluctance to interfere with the internal affairs of labor unions, including those procedures used to try union members, Parks v. Int'l Brotherhood of Electrical Workers, supra at p. 903. The Court in Falcone v. Dantinne, supra, at p. 1164 said:

> "We must preserve a careful balance between the protection of the rights of individual members on the one hand, and the maintenance of strong and effective union leadership and the avoidance of undue interference in internal union affairs on the other."

Also,

> "In determining whether the plaintiffs . . . were afforded a 'fair hearing' the court is neither authorized nor required to weigh the evidence presented to the union disciplinary body, or to substitute its judgment for that of the union body respecting the credibility of the witnesses or weight of the evidence." Id. at p. 1167.

In discussing a recent proposed amendment to the LMRDA, Assistant Secretary of Labor DeLury said that "the legislative history of the LMRDA makes it clear that great care must be taken to avoid interference with labor organizations' right of self-government." 7/ DeLury pointed to the major principles which guided the Senate Labor Committee:

> "1. The Committee recognized the desirability of minimum interference by Government in the internal affairs of any private organization. Trade unions have made a commendable effort to correct internal abuses; hence the committee believes that only essential standards should be imposed by legislation. Moreover, in establishing and enforcing statutory standards great care should be taken not to undermine union self-government or weaken unions in their role as collective bargaining agents.
>
> "2. Given the maintenance of minimum democratic

7/ Statement of Assistant Secretary of Labor DeLury before House Labor Subcommittee on Labor-Management Relations on H.R. 10779, in Daily Labor Report, 7/26/76, p. D-1.

> safeguards and detailed essential information about the union, the individual members are fully competent to regulate union affairs. The Committee strongly opposes any attempt to prescribe detailed procedures and standards for the conduct of union business. Such paternalistic regulation would weaken rather than strengthen the labor movement; it would cross over into the area of trade union licensing and destroy union independence." 8/

There is no express statement in the legislative history of §101(a)(5) that a taped or stenographic record is required as part of a "full and fair hearing." By implication a conclusion may be drawn that a complete record of the hearing is not required because such a provision, though considered by Congress, was excluded from the version of the bill finally enacted. House of Representatives Bill 4473, sponsored by Mr. Barden, provided that a verbatim record of the trial of a union member should be made. The Senate Bill sponsored by Mr. McClellan also provided for a written transcript:

> "[N] o member of any such labor organization may be fined, suspended, expelled, or otherwise disciplined by such organization or any officer thereof except for breach of a published written rule of such organization which is not inconsistent with any of the provisions of this title. Disciplinary action may not be taken unless such member has been (A) served with a written copy of the provisions of the constitution and by-laws or other governing charter of such organization which contains a listing of the rights and safeguards afforded him pursuant to this title with respect to the conditions under which disciplinary action may be taken; (B) served with written specific charges; (C) given a reasonable time to prepare his defense; (D) afforded a full and fair hearing; and (E) afforded final review on a written transcript of the hearing, by an impartial person or

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8/ Senate Labor Committee Report No. 187, quoted in DeLury's statement in Daily Labor Report, 7/26/76.

> persons (i) agreed to by such organization and the accused, or (ii) designated by an independent arbitration or mediation association or board." [Emphasis added.] Department of Labor, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, p. 248.

The legislative history of Title I, §101(a)(5) shows a concern that the standards for a fair hearing be sufficiently broad so as not to interfere with the internal affairs of unions.

In International Brotherhood of Boilermakers, etc. v. Hardemen, 401 U.S. 233, 246 (1971), the Supreme Court referred to Congress' concern:

> "Senator Kuchel, who first introduced the provision [§101(a)(5)] characterized it on the Senate floor as requiring the 'usual reasonable constitutional basis' for disciplinary action . . . . A stricter standard . . . would be inconsistent with the apparent congressional intent to allow unions to govern their own affairs and would require courts to judge the credibility of witnesses on the basis of what would be at best a cold record."

The Supreme Court then noted with implicit approval that it had no reason to believe that unions generally make verbatim transcripts of their proceedings.

Labor commentators also have said that unions' failure to make complete transcripts of hearings is unimportant to due process guarantees:

> "It is apparent that the basic weakness of union disciplinary procedures is not reflected in such incidentals as the failure to guarantee the accused the right to be represented by legal counsel, or the refusal to provide a verbatim transcript of the proceeding; it consists, rather, in the lack of an independent judiciary." Aaron, The Labor-Management Reporting and Disclosure Act of 1959, 73 Harv. L. Rev. 851, 874 (1960).

By enjoining defendants-appellants from disciplining the accused, the decision of the Court below, in effect, articulates a principle of law never before announced by any court. By implication, the Court below gave the right to

accused members in properly conducted disciplinary proceedings to set the rules under which they shall be tried -- i.e., that they can tape record their own trials and appeals.[9/] This principle constitutes an unwarranted intrusion into the internal affairs of labor unions which was neither permitted nor contemplated under the LMRDA or under any act of Congress nor under any decision or regulation of any administrative agency.

(c) There is no support in the stenographic transcript of the proceeding below for the conclusion of the Court that plaintiffs have not raised a frivolous issue and then equating the frivolous issue with a serious one.

The Court below, in its written Memorandum Opinion of September 20, 1976, found "that the question of a member's right to make his own record of the proceedings for purposes of intra-union appeals . . . irrespective of the absence of any such provision in the union's constitution" is not "a frivolous issue." It thereupon found that the issue was "a serious one," thus equating a non-frivolous with a serious issue (Appx., Exh. 3, pp. 4-5). This is an erroneous standard for issuing a preliminary injunction, especially under the LMRDA, and was rejected in the Danielson case, supra, where the Court was required to find only that the Regional Director had "reasonable cause to believe" that the charges filed were meritorious.

The Court below also stated:

9/ By implication, the Court also gave members the right to have a public or a court reporter present, if they desired.

> "Particularly since, in this case, two prior Local union findings of guilt have been reversed on procedural grounds by the union's appellate bodies, the court finds a substantial basis for plaintiffs' contention of procedural impropriety in the defendants' failure to allow plaintiffs the use of a tape recorder or stenographer to make their own record of the disciplinary proceedings." (Appx., Exh. 3, p. 4)

This is a perfect non sequitur.

Even if there were proof that the two decisions of the GEB Appeal Committee of April and July 1975 were reversed on procedural grounds, the procedural grounds did not involve in any way whatsoever the question of the accuracy of the minutes of the hearing. The fact that the decisions were reversed does not furnish any basis for the finding of the Court below that "a substantial basis" exists "for plaintiffs' contention of procedural impropriety in defendants' failure to allow the use of a tape recorder or stenographer to make their own record of the disciplinary proceeding." Indeed, the reversals and the direction of a de novo trial before a new Trial Committee of rank and file members of Local 10 established just the opposite. Thus, there is no support for the Court's conviction "that the question of the member's right to make his own record of the proceedings for purposes of intra-union appeals is a serious one." (Appx., Exh. 3, p. 4)

As a matter of fact, it was error to admit, over objection, these two decisions of the GEB into evidence, for they were the subject of the pending prior action in this Court and are not in any way involved in the instant action.

The Court below relied upon the decision of Kiepura v. Local Union 1091, United Steelworkers of America, 358 F. Supp. 987, 991-992 (N.D. Ill.

1973) for its conclusion that a serious issue was raised by plaintiffs. Its reliance thereon is misplaced and constitutes a clear misinterpretation of it.

In Kiepura a hearing was held on charges preferred against a member of a union. There was no record of any kind taken by anybody at the hearing. The Court noted that the decision against the accused member could only have been based on the "Committee members' personal knowledge or on facts de hors the trial record." (Kiepura, at p. 991) See also Boilermakers, supra, 401 U.S. 233 (1971). The case involved unusual circumstances since much of the evidence was an attempt to reconstruct what took place at a hearing almost four years prior to the court trial. The Court expressly stated at p. 992:

> "We do not hold that the use of a court reporter is a necessary element of a 'full and fair hearing.'"

It then concluded that:

> "under the circumstances of this case . . . the refusal to allow the plaintiff to supply a court reporter at his own expense was an abuse of discretion which did tend to deprive him of such a hearing," Id. at p. 992.

Thus, contrary to the interpretation of the Court below, Kiepura does not stand for the proposition that a member has an undisputed right to make his own tape or stenographic record of union disciplinary proceedings. Moreover, the facts in the instant case are clearly distinguishable from those in Kiepura. Here, the Court was not confronted with the task of reconstructing a trial thattook place almost four years ago. Here, evidence on the charges was taken and no reconstruction was required. In marked contrast to Kiepura, there is

here a complete record -- albeit not verbatim -- of the entire proceedings (Appx., Exh. 18). Further, the Court below found that plaintiffs were not barred from making their own notes of the proceedings (Appx., Exh. 3, p. 3). Finally, in contrast to Kiepura, it is undisputed that plaintiffs herein never requested a stenographer -- public or court -- to take the minutes of the hearings.

It is undisputed that, except under unusual circumstances declared by a court, a stenographer is not permitted by the Union to take minutes of disciplinary hearings and appeals. The Union is unwilling -- and there is no requirement in law -- to pay the costs of a court reporter. The worker in crafts which earn the highest pay might be able to afford a court reporter, but the worker in lower paid crafts certainly would not. To allow the better paid worker to have what the worker in the poorer crafts cannot afford is discriminatory.

Hart v. Local Union 1292, 341 F. Supp 1266 (E.D. N.Y. 1972) aff'd 497 F.2d 401 (2nd Cir. 1974), the only other case relied on by plaintiffs, does not stand for the proposition that a member has a right to tape record intra-union proceedings. Members of a union trial committee are laymen -- not stenographers. They listen to the evidence, just as jurors do who do not have stenographers either. The internal intra-union proceedings are tailored to laymen and the use of stenographers and verbatim transcripts create formalities which undermine or destroy the utility of these worker tribunals. The Secretary takes the minutes in the form of notes. Appellees were free to take their own

notes in the same way and they were therefore on a par, unlike Hart, supra. Upon appeal, they would be able to point out to the Appeal Committee any inconsistencies between the Secretary's notes and their own. The fact is they did not take their own notes and the minutes of trial and appeal tribunals stand unimpeached (Appx., Exhs. 7, 17-18, 39, 41).

Although the Court did not specifically state that plaintiffs had a right to use a tape recorder, it did so by implication,for its issuance of the injunction cannot be explained on any other basis. As the above discussion indicates, no Court has ever held that union members have a right to set the rules under which they shall be tried -- i.e., that they can tape record their own trials and appeals.10/

The Court's reliance on Kiepura is entirely unjustified, both factually and legally. Such unjustified reliance,in conjunction with the fact that Hart, the only other case cited by appellees, provides no support for appellee's position, warrants reversal of the order granting a preliminary injunction.

(d) There is no support in the stenographic transcript of the Court below that the balance of hardships tips decidedly in favor of plaintiffs. Merely stating that it is so is not proof that it is so.

A careful perusal of the stenographer's transcripts of the proceedings in the Court below does not contain a scintilla of evidence which in any

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10/ By implication, the Court below also gave the members the right to have a public stenographer or a court reporter present, at their own expense, if they desired.

way supports this part of a double requirement test in Sonesta, supra, for granting a preliminary injunction.

The Court below lifted a quote from the Sonesta case out of context, without doing what the Court did in that case and without any support in the stenographic transcripts therefore. A statement of legal principle made on the basis of a record in another case which was arrived at after an evidentiary hearing does not make that principle relevant to the instant case where the findings of fact, except those conceded, were made without any evidentiary support in the transcripts of the proceedings in the Court below.

(e) The Court below granted the identical relief in granting the preliminary injunction as demanded in the Complaint.

Since plaintiffs have admitted that they do not want a trial and seek only to enjoin the discipline which will have expired by the time of the final hearing in this lawsuit, the grant of this preliminary injunction results in giving plaintiffs the ultimate relief sought in this litigation. The case law clearly holds that such a result is unjustified, Wagner, supra.

(f) The Court below granted a preliminary injunction despite the fact that the accused were guilty of laches.

Plaintiffs knew as early as February 25, 1975 that it was established policy of the Grievance Committee of Local 10 not to permit the use of a tape recorder to record disciplinary proceedings and they knew as late as July 22, 1975 that the GEB of ILGWU had the same established policy with respect to appeals in disciplinary proceedings. In Klein's answering affidavit in

Local 10's motion to dismiss the complaint in the prior action pending in this Court: Docket No. 75 Civ. 4632 (CBM), he tendered plaintiffs the opportunity to test the question of whether they have the right to tape record the disciplinary proceedings against them, in the face of the rulings against such practice, in a plenary action or in another proceeding in a court of competent jurisdiction in advance of the Trial Committee's first hearing on December 18, 1975 and the adjourned hearing on January 8, 1976. Klein was present as a witness to testify before the Court below and if permitted to do so, would have testified to this effect.

Yet plaintiffs were content to sit home and do nothing.

Plaintiffs' failure to proceed during all this time attenuates their claim of urgency in requesting an injunction now.

"A complainant must not delay an unreasonable period of time enforcing a known right." Muscianese v. United States Steel Corp., 354 F. Supp. 1394, 1398 (E.D. Pa. 1973). Cf. Hays v. Seattle, 251 U.S. 233 (1920).

Plaintiffs' delay has injured defendants. Since the Union tendered to plaintiffs the right to seek judicial relief, the Union has been required to provide them with two Trial Committee hearings (December 18, 1975 and January 8, 1976) and a GEB Appeal Committee hearing (April 8, 1976). These hearings have cost the defendants many hours of work.

Since plaintiffs' own delay in seeking a ruling on their alleged "right" to tape record these disciplinary proceedings which could have

been brought earlier reflects a lack of urgency in their situation and since this same delay has injured the defendants, plaintiffs are guilty of laches and a preliminary injunction should not be granted. Muscianese, supra; Connell v. U. S. Steel Corp., 371 F. Supp. 991, aff'd, 516 F.2d 401 (5th Cir. 1975). 11/

CONCLUSION

For all the above reasons, it is clear that the preliminary injunction herein cannot be justified on traditional equitable principles. As a result, the Court's decree must be reversed.

11/ Although not part of traditional equitable principles, it is appropriate to note that the Court below further erred in failing to require plaintiffs to file an undertaking pursuant to Rule 62(c) of the Federal Rules of Civil Procedure upon granting the preliminary injunction.

Rule 62(c) of the Federal Rules of Civil Procedure provides that the court in granting an injunction may, within its discretion, require the party moving for an injunction to file an undertaking with the court to protect and compensate the opposing party should the injunction have been improper. An injunction undertaking always covers attorney's fees.

Appellees have demanded attorney's fees as well as damages in their Complaint. The Court below should have accorded defendants the same right to be compensated for their damages and expenses, including attorney's fees, should the Court ultimately find that the preliminary injunction was erroneously issued. In fact, the Court below had directed plaintiffs' attorney to prepare the Order granting plaintiffs a preliminary injunction and in such Order he provided for such a bond, but the Court below struck it from the Order which it signed.

In Donnelly Garment Co. v. International Ladies' Garment Workers' Union, 47 F.Supp 67, 68 (W.D. Mo. 1942) the Court observed:

> ". . . where injunctive relief has been granted and subsequently denied by the court, the aggrieved party may proceed . . . to assess damages . . . ." (continued)

11/ (continued)
In the same case the Court said that the

> "gravamen of defendants' [union] claim is the loss, expense or damage, including reasonable attorneys' fees, which resulted or occurred by reason of the erroneous granting of injunctive relief."

Because appellant in the instant case is equally entitled to be reimbursed for unjustified costs caused by appellees and because the posting of a bond by appellees was the only way to ensure appellants' protection, it was an abuse of discretion for the Court below to permit a preliminary injunction to issue without requiring the plaintiffs to file an undertaking.

Respectfully submitted,

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